IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
PERRY SMITH and	:	
KEVIN CLEVELAND	:	NO. 04-CR-472

M E M O R A N D U M

Gene E.K. Pratter, J. November 17, 2004

INTRODUCTION

Defendants Perry Smith and Kevin Cleveland move the Court for an order severing the counts in the indictment relating to the alleged carjacking (Counts 4 and 5) from the counts relating to the Defendants' alleged conspiracy and robbery of Shernoff Salad Company (Counts 1, 2, and 3). In their Motions, the Defendants assert that the inclusion of the carjacking counts would be prejudicial and confusing to the jury and those counts should be severed pursuant to either Rule 8(b) or Rule 14 of the Federal Rules of Criminal Procedure. Additionally, Defendant Kevin Cleveland asserts that inclusion of the carjacking allegations will infringe on his right to testify in his own defense, since he may want to testify only on one of the two issues, and not on both.

The government has responded to the Defendants' arguments by emphasizing that, as presented in the indictment, the government has structured this case as one where the carjacking and robbery arise from the same series of events and are part of a single conspiracy. Including

the carjacking and robbery in the same trial, according to the government, will encourage efficiency and prevent inconsistent verdicts. The government also asserts that the Court, by issuing proper limiting instructions, can ameliorate any potential prejudice.

The Court finds that the risk of any actual and undue prejudice in having a single trial including both the robbery and carjacking counts is minimal and can be ameliorated with limiting instructions, combined with the strong presumption in favor of trying all the counts that are part of the same alleged conspiracy together. The Court also finds that Defendant Cleveland has not made any showing that he has both important testimony to give concerning one set of the counts against him and a strong need to refrain from testifying as to the others. Therefore, the Motions will be denied.

BACKGROUND

Defendants Perry Smith and Kevin Cleveland both are charged with (1) conspiring to commit a robbery of Shernoff Salads Company thereby interfering with interstate commerce in violation of 18 U.S.C. § 1951, (2) interference with interstate commerce by robbing Shernoff Salads Company in violation of 18 U.S.C. § 1951, and (3) the use of firearms during a crime of violence in violation of 18 U.S.C. § 924. Defendant Kevin Cleveland is charged individually with (1) carjacking in violation of 18 U.S.C. § 2119, and (2) use of a firearm during a crime of violence in violation of 18 U.S.C. § 924. The Court held an evidentiary hearing to address the pending Motions as well as several other motions submitted by the Defendants. The factual substance of the testimony presented during the hearing days is as follows.

The allegations related to the carjacking are that on or about the night of August 13, 2003, a pizza delivery man, Terry Muchison, was approached by a man who displayed a firearm and

demanded that Muchison empty his pockets. Muchison complied and gave over everything in his pockets, including some money, his wallet, and the keys to his car. The armed man took Muchison's 1990 Ford Tempo with Pennsylvania tag EYX4649. Muchison later identified Cleveland as the man who robbed him and took his car.

The facts related to the robbery are that the Shernoff Salads Company was robbed on August 14, 2003 by two gunmen who brandished firearms and threatened the store owner, Jeffrey Shernoff. Another employee, Heidi Shernoff, was shot in the stomach during the course of the robbery. The gunmen stole approximately $1,500 from two Company cash boxes and Ms. Shernoff's purse before fleeing. Philadelphia police promptly arrived on the scene and obtained witnesses' descriptions of the events and of the assailants.

Witnesses from Shernoff Salads saw the robbers flee the scene in a gray Oldsmobile. Shortly after the robbery, the Philadelphia police located the car in Roosevelt Park, where witnesses saw three men run from the car to a lake in the Park. The police pursued the individuals and found Defendants Perry Smith and Kevin Cleveland in the lake. The police apprehended the Defendants, and Mr. Shernoff and an employee of Shernoff Salad Company, Robert Robinson, identified Smith and Cleveland as the robbers.

The government contends that the August 13 carjacking was an overt act in furtherance of the conspiracy between Smith and Cleveland to rob Shernoff Salad Company the next day. A basis for this assertion is that the tags from Muchison's stolen Ford Tempo were found on the gray Oldsmobile recovered at Roosevelt Park. The gray Oldsmobile itself had been reported stolen on August 12, 2003.

LEGAL BACKGROUND SUMMARY

There is a presumption against severing charges or defendants that are indicted together, especially in cases involving a conspiracy charge, unless the defendants can show that the trial would be manifestly unfair. Virgin Islands v. Sanes, 57 F.3d 338, 341-42 (3d.Cir. 1995). The initial joinder must involve the same acts or series of acts to be proper. FED. RULE CRIM. P. 8(b); United States v. Eufrasio, 935 F.2d 553, 567 (3d Cir. 1991). If the Court finds that joinder is proper then it must weigh the potential prejudicial effect versus the expense and time of separate trials that basically retry the same issue. United Sates v. Joshua, 976 F.2d 844, 847 (3d Cir. 1992). The defendant must demonstrate clear and substantial prejudice. United States v. Gorecki, 813 F.2d 40, 43 (3d Cir. 1987). If prejudice is found, the Court has the discretion to order separate trials of counts or provide any other relief as justice requires. FED. RULE CRIM. P. 14.

The "proper inquiry is whether evidence is such that the jury cannot be expected to 'compartmentalize' it and then consider it for its proper purpose." United States v. Dansker, 537 F.2d 40, 62 (3d Cir. 1976) (citing United States v. DeLarosa, 450 F.2d 1037, 1065 (3d Cir. 1971)). If the government has charged conspiracy in good faith, then that allegation alone is sufficient reason for trying conspiracy and all substantive offenses together. United States v. Sharma, 190 F.3d 220, 230 (3d Cir. 1999). The fact that one defendant is facing fewer charges than another defendant in a conspiracy case does not amount to prejudice, if a reasonable jury would be able to distinguish the offenses. Dansker, 537 F.2d at 62. Simply showing that the chance for acquittal would be higher in a separate trial is not enough to carry the burden. United States v. DeVillio, 983 F.2d 1185, 1992 (2d Cir. 1993).

DISCUSSION

There are two fundamental issues raised by the Defendants in their Motions to Sever the Counts. The first issue is whether the carjacking arose from the same act or series of acts as the robbery and whether the joinder was proper under Rule 8(b) of the Federal Rules of Criminal Procedure. The second issue is whether, if the joinder was proper, the prejudicial effect of trying these claims together outweighs the efficiency of a single trial, and, therefore, the Court should sever the claims pursuant to Rule 14 of the Federal Rules of Criminal Procedure. The Court finds that the carjacking and robbery are part of the same conspiracy as charged in the indictment, and so arise from the same series of acts (again, as envisioned by the government in constructing the case against the Defendants). In the Court's estimation, the potential prejudice and possible confusion of the jury does not outweigh the judicial economy of trying these cases together because both potential shortcomings can be cured effectively by a limiting instruction to the jury.

A. Same Act or Series of Acts

The Court must determine if the alleged carjacking and robbery in this matter arose from the same act or series of acts. The government clearly argues that the joining was proper under the indictment, since, under the government's theory of the case, the carjacking is an overt act in furtherance of the conspiracy. The robbery is the culmination of the conspiracy. Therefore, according to the government, the carjacking and robbery are a series of acts related to one robbery.

The Defendants disagree with the government's assertions and argue that the carjacking and robbery are not connected. Smith argues that there is "no logical connection" to Smith's

actions and the carjacking, while Cleveland argues the offenses are separate. The Court finds that the Defendants have failed to show how these acts are not connected to the overall alleged conspiracy charged in the indictment, and, thus, finds the joinder was proper under Rule 8 of the Federal Rules of Criminal Procedure.

The government's charging of a conspiracy in this matter is clearly in good faith, which the Defendants do not dispute. As such, the conspiracy allegation alone provides sufficient support for trying the conspiracy and all substantive offenses together. Sharma, 190 F.3d at 230. The issue is whether the carjacking and robbery are substantive offenses connected to the conspiracy. The Court finds that they are.

The indictment charges that the carjacking was the initial action in the conspiracy to rob Shernoff Salads Company. The Defendants fail to give any specific reasons why the robbery and carjacking are not connected to one another or the conspiracy. Instead they rely on general statements of a lack of "logical connection" or an argument that the crimes are separate. Unfortunately for Smith and Cleveland, a logical and factual connection clearly exists: according to the information thus far presented to the Court, the car that was used in the robbery had the license plates of the car that was stolen the night before. Further, Cleveland has been identified during the evidentiary hearing on the Motions by different witnesses as being involved in both the carjacking and robbery. Thus, the Court finds that carjacking and robbery arise from the same series of acts, and the joinder of these charges was appropriate.

B. Prejudicial Effect of Joinder

Since the joinder was proper, the Court must now consider if the prejudicial effect of the joinder is significant enough for the Court to order separate trials pursuant to Rule 14 of the

Federal Rules of Criminal Procedures. The Defendants have the difficult task of overcoming the strong preference of trying all charges in an indictment together. Sanes, 57 F.3d at 341-42. To overcome this preference, the Defendants must show the prejudicial effect of a joint trial to be clear and substantial. Gorecki, 813 F.2d at 43. The Defendants have failed to persuade the Court on this matter.

The Court finds that whatever prejudice does arise from the carjacking and robbery being charged together, it is not a clear and substantial prejudice that would prohibit the jury from considering evidence related to each charge independently. Moreover, the Court finds that, even if separate trials were granted, the evidence of the carjacking would still likely be admitted into the trial on the conspiracy and robbery charges to show the alleged plan of the Defendants.

Furthermore, Smith cannot simply rely on the fact that he is not being charged for the carjacking to show prejudice. Dansker, 537 F.2d at 62. Instead, he must show that a reasonable jury could not separate the evidence related to the carjacking from the evidence related to the robbery. The Court does not deny that there is potential risk for some prejudice or confusion to the jury might occur, but neither this prejudice nor possible confusion is clear and substantial. The limited prejudice and confusion can be significantly and sufficiently ameliorated by a limiting instruction. Thus, the Court is not willing to expend twice as many judicial and prosecutorial resources by having two trials with significantly overlapping evidence.

Finally, Cleveland's assertion that he is being prejudiced by being forced to testify to both counts, when he may have only wanted to testify to one count is unpersuasive. The Court finds that "only where the 'defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other'"

is there reason for the Court to sever the charges. United States v. Reicherter, 647 F.2d 397, 401 (3d Cir. 1981) (quoting Baker v. United States, 401 F.2d 958, 977 (D.C. Cir. 1968)). Cleveland has made no showing of what important testimony he may present or what strong need for refraining from testifying exists. In fact, Cleveland has simply made the simple assertion that he would be prejudiced if he wanted to testify to one and not the other, and has failed to "present enough information regarding the nature of the testimony he wishes to give on one count and his reasons for not wishing to testify on the other to satisfy the court that the claim of prejudice is genuine " Id. (quoting Baker, 401 F.2d at 977).

IV. CONCLUSION

For the foregoing reasons, the Court denies the Defendants' Motions to Sever the Counts. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

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GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

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O R D E R

Gene E.K. Pratter, J. November 17, 2004

AND NOW, this 17th day of November, 2004, upon consideration of the Defendant Perry Smith's Motion for Severance (Docket No. 26), Defendant Kevin Cleveland's First Motion to Sever Counts at Trial (Docket No. 34), the government's response to both motions (Docket Nos. 47 & 48), the arguments made at the evidentiary hearings on October 21, 22, and 26, 2004, and the Court's finding that the initial joinder was proper and the prejudicial effect is not clear and substantial, it is hereby ORDERED the Motions are DENIED.

BY THE COURT:

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GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE